BUSINESSEUROPE

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BUSINESSEUROPE contribution to the consultation on the rules applicable to horizontal cooperation agreements

INTRODUCTION

BUSINESSEUROPE is pleased to have the opportunity to provide its comments and suggestions on the Commission's draft regulations on R&D and specialisation agreements, and particularly on the draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union (TFEU) to horizontal cooperation agreements.

BUSINESSEUROPE believes that the main objective of the competition rules applicable to horizontal cooperation agreements is to encourage innovation and efficiency while ensuring that companies are able to self assess whether they comply with Article 101 TFEU and judges and courts are able to apply it correctly and consistently. The main focus of the guidelines should rest on a comprehensive, balanced, neutral and well justified assessment of whether horizontal agreements and concerted practices may restrict competition in order to facilitate companies in complying with antitrust rules.

1. GENERAL COMMENTS

Without commenting into details on the draft regulations, BUSINESSEUROPE would still like to stress that the drafts need to ensure a balanced approach to the protection of competition and of IPRs. Although the objective of some requirements contained in the current draft may be to protect competition, in some instances they tend to unduly penalise legitimate businesses' behaviour aimed at protecting their intellectual property rights (IPR) and lead to erosion of these rights or of the ability to protect them. This could at the same time affect companies' ability to be involved in R&D and standardisation. In this context, we would like to highlight the following aspects of the R&D regulation:

- Upfront disclosure of the "relevant" IPR as a condition for the exemption (Article 3.2): although being well intended, the disclosure requirement is too vague and is disproportionate; in addition, it could be rather difficult to assess upfront what is relevant or not.

- Equal access to the results (Article 3.3): the concept of "equal access" is neither easy to apply to IPR exploitation (for example for patents) nor appropriate as there is a need to reflect differences in the value and nature of the parties' contribution.

- Access to pre-existing know-how (Article 3.4): the current drafting limits the parties' freedom to pass or not their know-how to other parties. While the objective of avoiding misuse of IPR to restrain competition is desirable, applying this requirement to all agreements seems disproportionate, in particular as know-how is a rather complex IPR to protect.

The following comments will focus on the novelties introduced in the new draft guidelines, namely the sections on standardisation (chapter 7) and information exchange (chapter 2).

2. COMMENTS ON THE CHAPTER ON STANDARDISATION

BUSINESSEUROPE welcomes the adoption of revised draft guidelines, which will provide companies with further legal certainty and guidance, especially on important, complex and controversial issues such as standardization.

Standard setting generates important benefits for consumers such as increased interoperability, faster roll-out of the technology concerned, lower prices, enhanced product quality and increased innovation. Especially in areas like Information and Communication Technology (ICT), standards may facilitate economies of scale and contribute to interoperability and compatibility of products. Thanks to the development of open standards and interfaces, the ICT sector has enjoyed a remarkable spread around the world in the last two decades, providing affordable communication to billions of people worldwide.

The vast majority of standard setting activities do not raise any competitive concerns. Public authorities' intervention in standard setting processes involves a risk of chilling innovation and undermining the effectiveness of the standard process itself. Up to now, cases involving problems in standard setting have not been that common when compared to the large amount of standards approved at national or international level.

However, patent litigation is increasingly being brought up across Europe by patentees purely seeking license fees rather than protecting a competitive market position for their own products (so called Non-Practicing Entities). Non-Practicing Entities in some cases seek license fees in excess of those generally established within an industry (not "fair, reasonable and non-discriminatory" - FRAND). As stated above, these cases are however only a small portion of the trade of intellectual property – and they take place for standardized and non-standardized technologies alike. It is thus the non-practicing nature of the patentees that creates this risk, not standardization. Therefore, we believe it appropriate that companies can rely on a balanced application of competition law in order to receive fair, reasonable and non-discriminatory terms, for those specific cases.

The relationship between intellectual property rights and standards is complex. BUSINESSEUROPE recommends that any intervention based on competition law

preserves the existing sound balance of rewards for R&D to fuel European innovation versus fair and reasonable terms to use new technology that is required by standards.

Although certain concerns could be more properly addressed as matters concerning Article 102 TFEU, BUSINESSEUROPE welcomes the clarification given by the drafts on the application of antitrust rules to these cases. However, in some case the guidelines in our view go too far in setting certain requirements, as set out below.

2.1 Participation in standard setting and access to standards

BUSINESSEUROPE welcomes the introduction of clear guidance provided by paragraph 277 which establishes that where participation in standard-setting and the procedure for adopting the standard is unrestricted and transparent, standardisation agreements that set no obligation to comply with and provide access to the standard on fair, reasonable and non-discriminatory terms do not restrict competition within the meaning of Article 101(1). However, we believe that more guidance on what constitutes unrestricted and transparent procedures is necessary.

Standardization can in certain cases confer additional market power on essential patent holders. Often however standardized technology competes with other standardized and non-standardized technologies. Consequently, it can hardly be presumed that a holder of an essential patent attains a dominant market position just by virtue of that patent. We believe that the sections of the draft guidelines which appear to assume that ownership of an essential patent automatically confers dominance (e.g. paragraphs 262 and 284) should be revised accordingly or deleted.

In some cases however, market power of patent holders has the potential to be abused at the licensing level - e.g. by setting discriminatory terms or by charging excessive royalty rates – in ways that create significant inefficiencies and anti-competitive effects that would also harm consumers' interests. In cases where industry is locked into a standard, and in order to assess whether access to the standard is provided on fair, reasonable and non-discriminatory terms, the Commission suggests that licensing fees charged by an undertaking before the industry has been locked into the standard (*ex ante*) may be compared with those charged after the industry has been locked in (*ex post*). Such a comparison may be useful in a relatively straightforward standard-setting context where the technology is limited in scope and static, but it would not be possible in case of complex dynamic standards and in sectors where important R&D activity is carried out in parallel with the standardization process.

The draft guidelines seem to take the position that the current practice where Standard Setting Organisations aim to enable fair competition by requiring their members to pre-declare that they own potentially essential patents and to commit to licensing any such IPR on fair, reasonable and non-discriminatory terms could, despite these measures, be restrictive of competition. However, the current practices have so far shown no anti-competitive effects and have provided substantial pro-competitive benefit. Therefore, BUSINESSEUROPE believes this section of the draft should be revisited to take these pro-competitive effects into account.

2.2 Inclusion of substitute technologies

We also have concerns with regard to the statement contained in paragraph 288 saying that "as a general rule, the inclusion of substitute technologies in a standard is likely to give rise to restrictive effects on competition within the meaning of Article 101(1). In this regard, BUSINESSEUROPE submits that standardization should be technology neutral where possible. Secondly, since such inclusion is common, and often necessary, we would welcome further clarification on the reason why the Commission considers that this practice can amount to foreclosure of competitors.

2.3 Joint discussions between members of Standard Setting Organisations

The draft guidelines seem to suggest that joint discussions of licensing terms and in particular royalty rates within a Standard Setting Organisation (SSO) would always lead to a restriction of competition. However, if several patent holders have joint discussions with the key objective to establish a pool with a cumulative royalty rate and terms for the licensing of their essential patents claims that represents a fair balance between essential patent holders achieving a reasonable return for their R&D investments and providing low input costs for the competitive downstream industry, such discussion could also have pro-competitive effects on the end-consumers. Such pro-competitive effects have for example been recognized when companies set up a technology pool.

2.4 Testing and certification

Paragraph 305 states that entrusting certain bodies with the exclusive right to test compliance or on marking products for conformity goes beyond the objective of achieving efficiencies. BUSINESSEUROPE points out that on the contrary, for a standard to be successful it is essential that it delivers on its promise of interoperability. There are numerous examples where, in the absence of a strict certification and logo scheme, standards fail to do so and create confusion which goes at the expense of achieving efficiencies.

2.5 Specific identification of IPRs

Paragraph 281 states that disclosure of intellectual property rights that might be essential for the implementation of a standard should be required before that standard is agreed. It states that policies should require companies to make "reasonable efforts" to identify such patents. BUSINESSEUROPE would welcome further clarification of the definition of "reasonable efforts". In particular, it should be stated that this does not mean that standardization participants are required to carry out searches for all potentially essential patents. This could demand very substantial efforts both for technology providers and standard applicants with a questionable contribution over the effects of paragraphs 282 and 283 and could even shy away important stakeholders from the process. In addition, it is frequently difficult to identify patents which might be essential to a proposed standard.

The requirements described above may in some cases be excessive and create heavy burdens without creating additional certainty about compliance if implemented. We believe that specific disclosure obligations must be proportionate and contribute to innovation and efficiency gains without placing unnecessary burdens on companies.

3. COMMENTS ON THE CHAPTER ON EXCHANGE OF INFORMATION

BUSINESSEUROPE is pleased that the Commission recognises that information exchange can realise efficiencies and have pro-competitive effects, and in particular that the draft guidelines clarify that information exchange "can only be addressed under Article 101 TFEU if it establishes or is part of an agreement, a concerted practice or a decision of an association of undertakings". We are pleased that guidance is offered in the draft guidelines on this specific issue.

However, we believe that more examples concerning borderline cases should be included in the section on information exchange. While we sympathise with the reluctance of the Commission to include such examples in the guidelines, we submit that this would be extremely useful in responding to the need of clarity for companies wanting to assess their compliance with Article 101 TFEU when dealing with exchanges of information.

BUSINESSEUROPE welcomes the Commission approach focusing on the likely effects of the exchange on the market context, and in particular the conclusion that the exchange must have an "appreciable adverse impact on one (or several) of the parameters of competition such as price, output, product quality, product variety or innovation". Still, we submit that further clarification is needed as regards references to the fact that the exchange should not go beyond what is "indispensable" or "necessary" (e.g. in paragraphs 95 and 240) as this is very frequently a matter of difficult application for many undertakings.

The Commission's identification of the principal factors that companies carrying out self-assessment must take into account is welcome as it provides useful guidance for companies' compliance efforts. These factors are market coverage, the market's characteristics and the way these characteristics are modified by the information exchange, and the type of information exchanged.

With specific regard to the latter, BUSINESSEUROPE reiterates that more detailed examples related to borderline cases are needed. We would like to comment more in particular on the following issues addressed by the draft guidelines:

- clarification on what constitutes "genuinely public information": the draft guidelines define genuinely public information as "information that is equally easy (i.e., costless) to access for everyone" and specify that not all information in the public domain is genuinely public if "the costs involved in collecting the data discourage to a sufficient degree other companies and buyers from doing so". We acknowledge that determining whether the costs involved will deter companies from collecting data is very difficult, but we believe that more clarification is required and suggest that the final version of the guidelines provides it.

- clarification on what makes the exchange of information "public" or "non public": for the exchange of information to be considered genuinely public, the draft guidelines require that the data exchanged become "equally accessible to all competitors and buyers". BUSINESSEUROPE would welcome clearer directions as to when the Commission will consider this condition met, and in particular a clearer statement that publication on a freely accessible website would make the data genuinely public.

- clarification on the exchange of aggregated or individualised data: paragraph 85 of the draft guidelines describes the attitude of the Commission towards exchange of aggregated or individualised data in clear-cut cases. We would however welcome clarification and examples by use of examples for cases where conclusions may be less obvious.

- more accuracy on the evaluation of “historic” or “non historic” data: the draft guidelines do not seem to provide guidance that can prove particularly useful in realistic situations. The example relates to companies that are in an industry characterised by short term contracts and where prices are re-negotiated every three months, who directly exchange price data that is three years old. This type of example is not close to reality and does not help clarifying when the Commission will consider and exchange of information as likely or unlikely “to be indicative of the competitors' future conduct or provide a common understanding on the market”. It therefore does not meet the objective of giving directions to companies who look at the European Commission for guidance as to how they can run their daily activity in compliance with antitrust rules. The example should refer to a case that is likely to happen in reality, where companies might need to exchange more up-to-date data.

- clarification on the characteristics of the market and of the information exchange: paragraphs 73 and 74 argue that collusive outcomes are more likely to happen in transparent markets. This attitude may have a negative impact on statistics and studies issued in some market sectors with the objective of improving the transparency of these markets. Equally, paragraph 81 considers information on business volume as commercially sensitive. We suggest that the draft should specify that the disclosure of business volume does not provide per se commercially sensitive information that could lead to anti-competitive behaviour. While collusive risks are greater with homogenous products and markets, in those with significant product differentiation the diversity of products and other factors limits the possibility to deduce from the information any precise data.

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